

Internal Revenue Service  
memorandum

date: MAY 15 1991

TO: Director, Internal Revenue Service Center  
Kansas City, MO  
Attn: Entity Control

from: Technical Assistant  
Employee Benefits and Exempt Organizations

subject: CC:EE:3 - TR-45-1478-90  
Railroad Retirement Tax Act Status

Attached for your information and appropriate action is a copy of a letter dated November 2, 1990, from the Railroad Retirement Board concerning the status under the Railroad Retirement Act and the Railroad Unemployment Tax Act of the:

[REDACTED]

We have reviewed the opinion of the Railroad Retirement Board and, based solely upon the information submitted, concur in the conclusion reached by the Board that [REDACTED] is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

(Signed) Ronald L. Moore

\_\_\_\_\_  
RONALD L. MOORE

Attachment: Copy of letter from  
the Railroad Retirement Board

cc: Mr. Gary Kuper  
Internal Revenue Service  
200 South Hanley  
Clayton, MO 63105

08643

UNITED STATES OF AMERICA  
RAILROAD RETIREMENT BOARD  
844 RUSH STREET  
CHICAGO, ILLINOIS 60611

BUREAU OF LAW

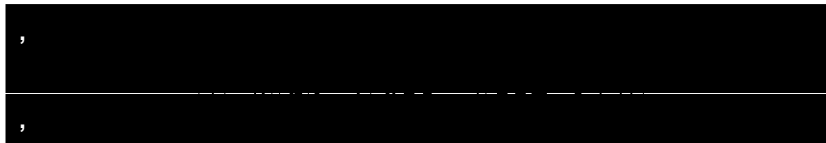
Assistant Chief Counsel  
(Employee Benefits and  
Exempt Organizations)  
Internal Revenue Service  
1111 Constitution Avenue., N.W.  
Washington, D.C. 20224

NOV 02 1990

Attention: CC:IND:1:3

Dear Sir:

In accordance with the coordination procedure established between the Internal Revenue Service and this Board, I am enclosing for your information a copy of an opinion in which I have expressed my determination as to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of the following:



Sincerely yours,

STEVEN A. BARTHOLOW  
Steven A. Bartholow  
Deputy General Counsel

Enclosure

0284B

UNITED STATES GOVERNMENT

RAILROAD RETIREMENT BOARD

**MEMORANDUM**

OCT 31 1990

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: [REDACTED]  
Employer Status

This is in response to your Form G-215 dated August 1, 1990, wherein you asked me to determine the status of the [REDACTED] (hereafter [REDACTED]) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The employer status of [REDACTED] has not previously been considered. The [REDACTED] is a political and corporate subdivision of the [REDACTED] established in [REDACTED] under [REDACTED] of the General Laws of that state. The [REDACTED] has the authority to conduct mass transit operations within its area of operations. In a letter dated June 28, 1990, [REDACTED], [REDACTED]'s Director of Railroad Operations, advised the Board that [REDACTED] has contracted with the [REDACTED] [REDACTED], an employer covered under the Acts, to operate [REDACTED] track miles used in commuter service. One of the commuter lines (the [REDACTED] line) crosses into [REDACTED]. [REDACTED]'s contract with [REDACTED] went into effect on [REDACTED]. [REDACTED] employs [REDACTED] people to provide [REDACTED] commuter service. These employees are compensated and reported by [REDACTED] through its own payroll. [REDACTED] further stated that [REDACTED] is not subject to the jurisdiction of the Interstate Commerce Commission and its operations do not use any electric locomotive power. He also provided a copy of the contract between [REDACTED] and [REDACTED] which is currently in effect.

As you are aware, the definition of an employer is found in section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) and in a substantially similar provision of the Railroad Unemployment Insurance Act. An employer is defined, in pertinent part, to include:

"(i) any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49 [the Interstate Commerce Act];

In general, (former) Part I of the Interstate Commerce Act applies to common carriers engaged in the transportation of passengers or freight, wholly or in part by railroad, in interstate commerce. A governmental unit can be a common carrier so as to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. See Legal Opinions L-81-160 and L-90-47.

"(b) the Interstate Commerce Commission does not have jurisdiction under this subtitle over rail mass transportation provided by a local public body if -

- (1) the Commission would have jurisdiction but for this section; and
- (2) the fares of the local public body, or its authority to apply to the Commission for changes in those fares, is subject to the approval or disapproval of the chief executive officer of the State in which the transportation is provided." 49 U.S.C. § 10504(b).

"Notwithstanding subsection (b) of this section, a local public body, described in subsection (b), is subject to applicable laws of the United States related to:-

- (1) safety

Director of Research and Employment Accounts

(2) the representation of employees for collective bargaining; and

(3) employment retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers."

The Railroad Retirement and Railroad Unemployment Insurance Acts are laws of the United States related to "retirement, annuity and unemployment systems". Therefore, the exemption contained in 49 U.S.C. § 10504(b) is not applicable to a determination regarding coverage under the Acts administered by the Board. 49 U.S.C. § 10504(c), cited above, is a clear statement by Congress that providers of urban mass transit such as the [REDACTED] may, notwithstanding their exemption under subsection (b) from ICC jurisdiction, be subject to laws such as the Railroad Retirement and Railroad Unemployment Insurance Acts.

However, in the past this office has not held a rail carrier to be an employer unless it has actually commenced operating a railroad. See Legal Opinions L-81-160 and L-90-47. The [REDACTED] is not an operator of a railroad and has never done so to this date. It is merely a subsidy disbursing entity of state government which contracts with a rail operator, currently [REDACTED], to provide commuter service. Such service has been provided by rail carriers, including the [REDACTED], under contract since [REDACTED]'s inception in [REDACTED]. Pursuant to its current contract, [REDACTED] presently provides all services, including equipment, maintenance, training and employees. Employees providing service under the contract are compensated by [REDACTED] and reported through its payroll. Under the contract, the [REDACTED] has no control over the operations of the commuter service provided by [REDACTED], except the limited right to modify the schedule.

Therefore, it is my opinion that the [REDACTED] is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. A new submission should be made if the [REDACTED] should actually begin operating as a carrier by railroad. An appropriate Form G-215 is attached.

  
Steven A. Bartholow

Attachment